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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CAUSE NO. PD-0967-17

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/15/2018
DEANA WILLIAMSON, CLERK

PETER ANTHONY TRAYLOR
APPELLANT

v.

THE STATE OF TEXAS
APPELLEE

APPELLANT'S BRIEF ON STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

On Discretionary Review from the Court of Appeals for the Thirteenth District of Texas at Corpus Christi-Edinburg, in Cause No. 13-13-00371-CR, on Appeal from Cause No. 366-82274-2010, 366th Judicial District Court, Collin County, The Honorable Ray Wheless, Judge Presiding, COMES NOW Peter Anthony Traylor and presents to this Honorable Court his Brief on the State's Petition for Discretionary Review.

TABLE OF CONTENTS

TABLE OF CONTENTS…….....2

INDEX OF AUTHORITIES……..…….……...……3-4

STATEMENT REGARDING ORAL ARGUMENT……5

STATEMENT OF FACTS……..…….……5-14

ISSUES PRESENTED…….15

1. Has the Court of Appeals misapplied *Blueford v. Arkansas* by holding the two jury notes indicating the jury deadlocked on a lesser-included offense amount to an informal verdict of acquittal on the charged offense?

2. Do mere jury notes regarding a deadlock on a lesser-charge contain sufficient indicia to show the jury manifestly intended an informal verdict of acquittal?

3. Did *Blueford v. Arkansas* overrule this Court's precedent that a jury's report of its progress towards a verdict does not amount to an informal verdict of acquittal?

ARGUMENT……...15-29

CONCLUSION……29-30

PRAYER FOR RELIEF……..…….……..30-31

CERTIFICATE OF SERVICE…….…….....32

CERTIFICATE OF COMPLIANCE.....32

INDEX OF AUTHORITIES

CASES

Antwine v. State, 572 S.W.2d 541, 543 (Tex. Crim. App. 1978)……22

Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)……...16

Blueford v. Arkansas, 566 U.S. 599, 132 S.Ct. 2044, 2050, 182 L.Ed.2d 937 (2012)……..16, 17-21, 25-29

Burks v. United States, 437 U.S. 1, 10, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)……..16-17

Cardona v. State, 957 S.W.2d 674, 677 (Tex. App.—Waco 1997, no pet.)……...22

Ex parte Cantu, 120 S.W.3d 519 (Tex. App. Corpus Christi 2003, no writ)……...22

Ex parte Zavala, 900 S.W.2d 867, 870 (Tex. App.—Corpus Christi 1995, no writ)……22

Samudio v. State, 648 S.W.2d 312, 314 (Tex.Crim.App.1983)……...17

Sanabria v. United States, 437 U.S. 54, 66, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978)……....16-17

Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986)…….....17

Smith v. Massachusetts, 543 U.S. 462, 468 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005)…….....17

State ex rel. Hawthorn v. Giblin, 589 S.W.2d 431, 433 (Tex. Crim. App. 1979)……22-24

Thomas v. State, 812 S.W. 2d 346 (Tex. App.—Dallas 1991, pet. ref'd)……22

United States v. Ball, 163 U.S. 662, 671, 16 S.Ct. 1192,
41 L.Ed. 300 (1896)……17

United States v. Martin Linen Supply Co., 430 U.S. 564, 571,
97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)……17

CONSTITUTIONS AND AMENDMENTS

U.S. CONST. amend. V……17-19

TEX. CONST. art. 1, § 14……17-19

STATUTES

TEX.CODE CRIM. PROC. ANN. art 37.01 (West 2006)……...21-22

TEX.CODE CRIM. PROC. ANN. art 37.10 (West 2006)……...…21-22

STATEMENT REGARDING ORAL ARGUMENT

This Court stated that oral argument was permitted in its order granting the State's request for discretionary review. The Respondent believes oral argument will assist the Court in resolving the issue before the Court.

STATEMENT OF FACTS

The Jury started to deliberate at 11:28 AM and, only thirty-seven (37) minutes later the Jury's First Note of Six Notes over two days is received by the Court at 12:05 PM on December 12, 2012. (RR1.4: 53; CR: 214)

The following represents the entire recorded proceedings from telephone call by a juror reporting the jury being deadlocked until the Court's granting of a mistrial, at the request of the State and over the objection of the Appellant and subsequent and immediate request by Appellant for the Court to deliver an *Allen* Charge.

THE COURT: Back on the record in State versus Peter Traylor. We've received a phone call from the jury that indicates that they're deadlocked. They've been deliberating about four-and-a-half hours now. State have a request.

THE STATE: Request that they continue to deliberate.

THE COURT: Mr. Schultz?

MR. SCHULTZ: We wish a mistrial. Let me ask you this. Do they have any indication of the numerical split?

THE COURT: I wasn't told that. Mr. Chacon, did they indicate to you what the number was?

THE BAILIFF: No, sir.

THE COURT: They just—was it the Presiding Juror that called you? You don't know who it was? He just received a phone call from the jury that just said they're deadlocked.

MR. SCHULTZ: Perhaps I was a bit premature in my request. I'd like to withdraw it before you rule.

THE COURT: Yes, sir, you may withdraw it.

MR. SCHULTZ: Yes.

MR. SCHULTZ: Do you propose just to tell them to continue and not anything else? Would that be what you would do?

THE COURT: Is either side requesting an Allen Charge?

THE STATE: I would like an Allen Charge, Judge.

THE COURT: Do you oppose that request??

MR. SCHULTZ: Only—only it doesn't seem like it's been quite that long for something that drastic. But, I mean, it—it doesn't matter. I think that's the only ever issue on a Dynamite Charge, is length of time they've been deliberating. It's been a short trial. I'll say that.

THE COURT: It has been, considering that we didn't start testimony until Tuesday morning. So we had two—one full day of testimony Tuesday. Today is Wednesday.

MR. SCHULTZ: Would you be willing to inquire of their numerical split? Without regard to which way, would you be—would you consider that?

THE COURT: Does that State oppose that request?

THE STATE: For the time being, I do, Judge.

THE COURT: Well, one alternative is to let—to end the day and have the jury come back in the morning and resume deliberations in Maybe a break in deliberations and going home for the evening and coming back in the morning might result in a verdict. We can—our options are to let them work a reasonable time. I was planning on letting them work until 6:00, but they've indicated that they're deadlocked.

The other option would be to discharge them, let them come back in the morning and resume deliberations to see if that would result in a verdict.

THE COURT: Do you have any objections to that, State?

THE STATE: No, Your Honor.

MR. SCHULTZ: I wish you'd work them, a little longer beforehand, before you do that—

THE COURT: All right.

MR. SCHULTZ: --and just have them continue. And I don't know that—I mean, if we're thinking—I guess I don't see the harm in requesting, tell me how your—your vote is, without telling me which way it is. I don't—I do not know that there's a hammer. That might—that might give us some information on—like, let's say it's 11 to 1.

THE COURT: Well, its going to give one side or another an upper hand in terms of what's requested after that. For example, if you know that it's close to not guilty, you'll want them to continue deliberating.

MR. SCHULTZ: I don't want to ask them which way you're voting, not guilty or guilty. I'm not suggesting that. I'd just like to know, are we fighting an 11 to 1, or is it 6-6, or 5, 5—

THE COURT: Do you oppose that request?

THE STATE: Judge, that's fine.

THE COURT: All right. I'll send them a note and ask, without divulging the guilt or innocence, to tell me the numerical number of the jurors' votes, okay?

THE COURT: Well, we have a problem because they have to include the lesser included, so they're—right now, we're assuming that we're talking about just the first question, whether he's guilty or not of the aggravated assault.

MR. SCHULTZ: You're right.

THE COURT: And we don't know which of those two questions they may—I mean, there are two different issues that they'd have to answer. They'd have to tell us if they've moved on past the first question and they're hung up on the second question, or if they're hung up on the second question.

MR. SCHULTZ: You're right.

THE COURT: So how do we poll them about that? You want to ask them specifically which question that they're stuck on and what the numerical value of the vote is for that question?

MR. SCHULTZ: I'm not suggesting that kind of invasion, really. I don't know.

THE COURT: All right. Well, let's just let them answer generally, then what their vote is.

THE COURT: All right. I've entitled this, Court's Inquiry. Members of the Jury, the Court has been advised that the jury is deadlocked in its deliberations. Without indicating whether your vote is guilty or not guilty, please indicate, in the spaces provided below, the number of jurors voting one way or the other on the guilt or innocence questions. And I have blank, and then I have a slash and then another blank next to it. Would that—is the State opposed to that?

THE STATE: No, it's fine, Judge.

THE COURT: Are you opposed to that?

MR. SCHULTZ: No, sir.

THE COURT: Does that comply with you request. All right. Thank you.

(4:49 resume deliberations) (Jury note at 5:01)

THE COURT: Well, back on the record in State versus Peter Traylor. Contrary to the Court's specific instructions to the jury, the jury has indicated the number of people voting guilty and the number of people voting not guilty on both the primary charge and the lesser included charge. So the Court and the Bailiff, if he reviewed the note, are both aware of the jury's vote at this time on those issues. So does either side wish to know where the vote is at this time? Is the State requesting that information?
(CR—218; Jury Response to Court's Inquiry)

THE STATE: No, Judge.

THE COURT: All right, Mr. Schultz, are you requesting that information?

MR. SCHULTZ: Well, it's awkward. Sure, I'm interested in—in what they've got to say.

THE COURT: All right. Well, I requested the information specifically about the number for and the number against. And so they're on the lesser included offense, and the vote is 5-7. That's where we are.

MR. SCHULTZ: The vote is—

THE COURT: 5 to 7. I'm—you requested—both sides requested not to know whether it was for guilty or innocent. And so they're on the lesser included offense, and the vote currently stands at 5 to 7. So the Court's going to instruct the jury to continue their deliberations. Are you still requesting the Allen Charge, State? It's 5:00 now. The jury's been deliberating since about noon, so they've been deliberating for about five hours, excluding the time they went to lunch.

THE STATE: No, Judge.

THE COURT: All right. Mr. Schultz?

MR. SCHULTZ: No, sir.

THE COURT: All right.

MR. SCHULTZ: Certainly not at this time. Something may change the next time we visit that issue.

THE COURT: Would the State be opposed to advising the jury, the Court is requesting that they continue their deliberations until 6:00 PM today, and if they're unable to reach a verdict, that we'll come back in the morning?

THE STATE: I'm fine with that, Judge.

MR. SCHULTZ: That's okay.

THE COURT: All right.

(Jury resumes deliberations at 5:05)

THE COURT: The supplemental instruction says, Members of the Jury, the Court has been advised that the jury is deadlocked in its deliberations. Please continue your deliberations until 6:00 PM today. If you are unable to reach a verdict by that time, the jury will return at 9:00 AM tomorrow to resume deliberations. Any objection?

MR. SCHULTZ: No, sir. That's better than an Allen Charge, if you ask me.

THE COURT: All right. You can take—well , they were in here when I discussed it, so you can go ahead and take it back.
(Resume deliberations)

THE COURT: Let's bring the panel in, please.

THE BAILIFF: All rise.

(Jury seated.)

THE COURT: You may be seated, ladies and gentlemen. Ladies and gentlemen, I know you've been working very diligently on this case. You've been back there for a long time considering all the evidence very carefully. Your notes and your communication with the Court indicate that your're really reviewing this case as you should be. It's now a little bit after 6:00. We're going to go ahead and break for the evening and have you come back at 9:00 AM…Tomorrow morning, when you come back at 9:00 AM, you go straight back in the jury room. When you're all there, then you can

> resume your deliberations. So you are excused, We'll see you back tomorrow morning at 9:00 AM. We'll be in recess until then. (RR1.4—64-74)

The "***Court's Inquiry Concerning the Jury's Vote***" was the response to the telephone call by the anonymous juror reporting the Jury was deadlocked. (CR: 218) To be clear, and what was in direct contradiction to what the Court requested, the Court, Counsel for State and Counsel for Appellant were apprised of three things (explicitly and implicitly): (1) All twelve (12) juror had decided Appellant was "Not Guilty" of the offense as Charged in the Indictment—Appellant had been acquitted of the offense of Burglary of a Habitation while Attempting to Commit or Committing Aggravated Assault; (2) All twelve (12) jurors did not believe the allegation regarding the use/exhibition of a "deadly weapon"; and (3) Five (5) jurors believed Appellant was "Guilty" of the lesser-included charge, while seven (7) jurors believed Appellant was even "Not Guilty" of the lesser-included charge. (CR: 218)

The following day the Jury re-commenced deliberations at 9:00 AM. (RR1.5—4) At 11:30 AM, the Court received the sixth (6) and final note from the Jury. In part, Note #6 stated: "*Judge, The Jurors are at an impasse with 2 Jurors for "not guilty" and 2 Jurors for "guilty" who have stated they will not (underline in original) change their position….The vote overall at this time is:*

8 "Not Guilty" and 4 "Guilty."""

The following is the final exchange between the Court, Counsel for State, Counsels for Appellant at Trial, and the Jury:

MR. SCHULTZ: How is the Court inclined to deal with this, Judge?

THE COURT: Grant a mistrial, come back and start all over another day and another time.

MR. SCHULTZ: When we go on the record, we'll probably be objecting to the mistrial and requesting a dynamite charge.

THE COURT: Okay. Go ahead and bring the jury in, please.

THE COURT: All right. Ladies and gentlemen of the jury, I know you've been working very hard on this case, and I've worked you a lot longer and harder than probably you thought I should have. But I was hoping that you could reach a verdict. I understand this is a difficult case. The issues in this case have not been easy. I received your note last night indicating that the jury did not believe that Mr. Traylor was guilty of the main charge of the offense, but that there was disagreement amongst jurors in the lesser included offense and that you were hung up on that issue and that the vote apparently changed by only one juror from last night into today, even after deliberating for almost three hours today. So the note that I received, Ms. Topping—excuse me—is that the jury is hopelessly deadlocked; is that correct?

PRES. JUROR: I used the word impasse, but I suppose deadlock is probably the legal term. But we are at a point where we have 4 stated emphatically that they won't change their position.

THE COURT: All right. Thank you. Does the State have a request at this time?

THE STATE: Judge, I think that, based on the nature of the notes and length of time in deliberation, that the Court should declare this a mistrial and reset it to the jury trial docket.

THE COURT: All right. Thank you. Mr. Andor?

MR. ANDOR: Yes, Judge. I'm sure the Court will remember what I said previously, before the Jury came back in. While we thank the jury for their service, we'd ask them to try just a little bit longer, because they've heard all the evidence. So we object to the mistrial and ask for a Dynamite Charge.

THE COURT: All right. Thank you. The requested Allen Charge is overruled and denied. The testimony if this case consisted of one day essentially, and the jury's been deliberating for about eight hours, almost as much time deliberating as time they spent hearing the evidence in this case. Based on the jury's statement that they don't believe that further deliberations would result in a verdict in this case, the Court declares a mistrial, and we will have to come back to try this case again on another date. (RR1.5—4-8)

ISSUES PRESENTED

1. Has the Court of Appeals misapplied *Blueford v. Arkansas* by holding that the two jury notes indicating the jury deadlocked on a lesser-included offense amount to an informal verdict of acquittal on the charged offense?

2. Do mere jury notes regarding a deadlock on a lesser-charge contain sufficient indicia to show the jury manifestly intended an informal verdict of acquittal?

3. Did *Blueford v. Arkansas* overrule this Court's precedent that a jury's report of its progress towards a verdict does not amount to an informal verdict of acquittal?

ARGUMENT ON ISSUES PRESENTED

STANDARD OF REVIEW, AUTHORITIES AND ARGUMENT

The facts relevant to this issue are set out in the Statement of Facts and are incorporated herein.

Applicable Law and Standard of Review/Double Jeopardy

The Double Jeopardy Clause commands that "No person shall be subject for the same offense to be twice put in jeopardy of life or limb." See U.S. CONST.AMEND. V. The Clause prohibits the State from repeatedly attempting to convict a Defendant of an offense, thereby "subjecting him to

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Blueford v.* Arkansas, 566 U.S. 599, 132 S.Ct. 2044, 2050, 182 L.Ed.2d 937 (2012). The Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal." *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *U.S. v. Scott*, 437 U.S. 82, 96 (1978); U.S. CONST. amend. V; TEX. CONST. art. 1, § 14. To permit a second trial following an acquittal would grant to the State what the clause forbids: the proverbial "second bite at the apple." *Burks v. United States*, 437 U.S. 1, 10, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (recognizing that the double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first trial).

To implement this rule, the Supreme Court has articulated two principles. First, an acquittal occurs if a jury's decision, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) To help ascertain whether an acquittal has occurred, the form of the fact-finder's resolution "is not to be

exalted over [its] substance"; at the same time, however, the form of the fact-finder's resolution cannot be "entirely ignored." *Sanabria v. United States*, 437 U.S. 54, 66, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). Rather, the Court asks whether the fact-finder has made "a substantive determination that the prosecution has failed to carry its burden." *Smith v. Massachusetts*, 543 U.S. 462, 468 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005). Jurisdictions have different procedures respecting the announcement of verdicts and the entry of judgments, but that diversity has no constitutional significance. Jeopardy terminates upon a determination, however characterized, that the "evidence is insufficient" to prove a defendant's "factual guilt." *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Thus, the Court has treated as acquittals a trial judge's directed verdict of not guilty, *Smith*, 543 U.S., at 468, 125 S.Ct. 1129; an appellate reversal of conviction for insufficiency of the evidence, *Burks*, 437 U.S. at 10, 98 S.Ct. 2141; and, most pertinent here, a jury' announcement of a not guilty verdict that was "not followed by any judgment," *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 41 L.Ed. 300 (1896).

Traylor v. State, 534 S.W.3d 667 (Tex. App. Corpus Christi (2017)

In *Blueford*, after a few hours of deliberation, the jury foreperson reported that all twelve jurors were unanimous against guilt on the charged

offense but that they were deadlocked on the lesser-included offense. *Blueford*, 566 U.S., at ____, 132 S.Ct. at 2049. The trial court told the jury to deliberate. *Id.* When the jury returned a half hour later, the foreperson stated that they had not reached a verdict. *Id.* The foreperson did not state as to which offense they had not reached a verdict. *Id.* The court declared a mistrial and discharged the jury. *Id.* Although the jury never reached a formal verdict prior to being discharged, the defendant argued that the foreperson's report that all twelve jurors were unanimous against guilt on the charged offense amounted to an acquittal on that offense, which barred a second prosecution. *Id.* at 2050.

The United States Supreme Court disagreed, because the foreperson's report "lacked the finality necessary" to amount to an acquittal for double jeopardy purposes. *Id.* The Court relied on the following: (1) deliberations resumed after the report, thereby making it at least possible that some jurors reconsidered the defendant's guilt on the charged offense; (2) nothing in the jury charge prohibited the jurors from reconsidering their votes on the charged offense; and (3) at the conclusion of deliberation, the foreperson stated only that the jury was "unable to reach a verdict" but gave no indication whether it was still the case that all twelve jurors were unanimous against guilt on the charged offense. *Id.* at 2050-51. However, by addressing and rejecting the

defendant's argument, the Court recognized in *Blueford* that, even short of a formal verdict of acquittal, a jury's post-deliberation communication may, in an appropriate case, contain the finality necessary to amount to an acquittal for double jeopardy purposes. *Id.*

Here, like in *Blueford*, the foreperson reported that all twelve jurors were unanimous against guilt on the charged offense buy that they were deadlocked seven/five against guilt on the lesser-included offense. Also like in *Blueford*, the jury resumed deliberations after the foreperson's report, and nothing in the jury charge prohibited the jurors from reconsidering their votes on the charged offense during that time. If the record in this case contained only the foreperson's initial report, we could confidently say, as did the *Blueford* Court, that it was at least possible that some jurors might have reconsidered Appellant's guilt as to the charged offense after continued deliberations. However, we cannot confidently entertain that possibility based on what transpired after jury deliberation concluded. Unlike in *Blueford*, the record in this case shows that, at the end of jury deliberation, the foreperson reported that the jurors were now deadlocked eight/four against guilt, which prompted the following colloquy between the trial court and foreperson:

THE COURT: I received your note last night indicating that the jury did not believe that Mr. Traylor was guilty of the main charge of the offense, but that there was disagreement amongst jurors in the lesser included offense and that you were hung up on that issue and that the vote apparently changed by only one juror from last night into today, even after deliberating for almost three hours today. So the note that I received, Ms. Topping—excuse me—is that the jury is hopelessly deadlocked; is that correct?

PRES. JUROR: I used the word impasse, but I suppose deadlock is probably the legal term.

As the trial court's comments demonstrate, prior to the end of deliberation, the jury remained unanimous against guilt on the charged offense but deadlocked seven/five against guilt on the lesser-included offense; however, by the end of deliberation, only one juror's vote had changed from guilty to not guilty on the lesser-included offense, making the final vote eight/four against guilt on the lesser-included offense. The foreperson then confirmed that there was an impasse or deadlock in response to the trial court's question, as framed. The foreperson's post-deliberation report of an eight/four deadlock against guilt, combined with her post-deliberation answer to the trial court concerning that deadlock, established that all twelve jurors remained unanimous against guilt on the charged offense and foreclosed any reasonable speculation that the deadlock related to the charged offense rather than the lesser-included offense.

Cf. id. (noting that the post-deliberation record was silent regarding whether the jurors still believed that the defendant was not guilty of the charged offense). Thus, the post-deliberation record in this case shows what the record in *Blueford* did not: a final resolution *plainly intended* to indicate Appellant was not guilty of the charged offense of first-degree burglary. Unlike *Blueford*, the jury's communication contained the finality necessary to amount to an acquittal on the first-degree burglary for double jeopardy purposes; the trial court clearly and plainly understood that to be the jury's verdict, and neither the State nor Appellant, at trial or on appeal, disputed this fact.

Texas law clearly recognizes the existence of an informal verdict of acquittal.[1] *See* TEX. CODE CRIM. PROC. ANN. arts. 37.01 & 37.10 (a)

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[2] Here, the Trial Judge instructed the **Traylor** jury to consider the offenses in order, from the charged offense of first-degree felony Burglary to the second-degree felony Burglary, specifically: "*Now, if you find from the evidence beyond a reasonable doubt that on or about the 9th day of July, 2010, in Collin County, Texas, the Defendant, Peter Anthony Traylor, did then and there intentionally or knowingly, enter a habitation, without the effective consent of Alicia Carter, the owner thereof, and attempted to commit or committed an aggravated assault against Alicia Carter, then you will find the Defendant guilty as charged in the indictment. Unless you find from the evidence beyond a reasonable doubt, of if you have a reasonable doubt that the Defendant is guilty of Burglary of a Habitation and Attempting to or Committing Aggravated Assault as Charged, or if you cannot agree, you will next consider whether he is guilty of the lesser-included offense of Burglary of a Habitation and Attempting to or Committing Assault as instructed below."* (CR: 206-207) Moreover, the State's closing arguments repeated this same directive: "*Now, you have sort of a stair-step of charges that you could possibly consider in this case…Now, the first Charge then on you*

(West, Westlaw through 2015 R.S.). Article 37.01 provides: "Verdict" is defined as a "written declaration by a jury of its decision of the issue submitted to it in the case." Article 37.10(a) provides that a trial court "shall" render judgment in accord with the jury's verdict if the verdict is informal and it "manifestly appear[s]" that the jury intended to acquit the Defendant. *Id.*

Texas cases surveyed by the Appellate Court have considered whether jury communication originating from a jury note manifested a jury's intent to acquit the defendant under article 37.10(a), but none found such intend based on the records reviewed by the Courts in those cases. *See State ex rel. Hawthorn v. Giblin*, 589 S.W.2d 431, 433 (Tex. Crim. App. 1979); *Antwine v. State*, 572 S.W.2d 541, 543 (Tex. Crim. App. 1978); *Ex parte Zavala*, 900 S.W.2d 867, 870 (Tex. App.—Corpus Christi 1995, no writ); *Cardona v. State*, 957 S.W.2d 674, 677 (Tex. App.—Waco 1997, no pet.); *Thomas v. State*, 812 S.W. 2d 346 (Tex. App.—Dallas 1991, pet. ref'd); *Ex parte Cantu*, 120 S.W.3d 519 (Tex. App. Corpus Christi 2003, no writ).

Hawthorn has evolved in the last forty (40) years into what appears to be

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verdict form, did he commit burglary of a habitation...commit or attempt to commit aggravated assault…[t]hat's the first thing. The second thing to consider, ***if you can't agree on that beyond a reasonable doubt unanimously****, is to go to the next Charge...a lesser included charge of burglary...attempting to or committing…assault.* (RR1.4: 26-27)

the single-most important decision when reviewing informal verdict/double jeopardy cases. Two important aspects of *Hawthorn* should provide this Court and all Appellate Courts plenty of concern that for the past forty (40) years *Hawthorn* has guided or, more appropriately, misguided, the statutory law of informal verdicts and the Federal and State constitutionally protected right of an accused not being subject to double jeopardy. First, *Hawthorn* was not even considered by an intermediary appellate court because the remedy sought was a writ of prohibition. Second, *Hawthorn* never addressed any issue of double jeopardy either as a separate issue or in relation to statutory law of an informal verdict. Based on an extremely limited agreed statement of facts presented to the Court of Criminal Appeals, in lieu of the trial court transcript if one was even recorded, this Court forty (40) years ago focused exclusively on the simple fact that the jury's communications were in response to the Trial Court's question regarding the status of the jury's deliberations. However, based on the limited agreed statement of facts it was actually the specially appointed prosecutor who requested the communications for the jury and the Trial Court simply obliged. Moreover, the Defendant in that case made a motion for mistrial which was granted by the Trial Court. This, even today, is what the State asks this Court to continue following as the single-most important

precedent in determining the relationship between an informal verdict and double jeopardy.

The following propositions are or ought not to be in dispute: (1) Texas law recognizes informal verdicts; (2) Texas law recognizes a formal verdict; (3) Texas law requires each member of the Jury to swear under oath to follow the law and to render a true verdict; and (4) Texas law requires a Trial Court to provide a Jury with the appropriate instructions via the Court's Charge prior to deliberations. When considering these four (4) propositions together what should become obvious is that the juror's oath to follow the law, ultimately delivered in the Court's charge prior to deliberations, instructing and directing the jury to render a formal verdict, effectively makes it a violation of (1) the juror's oath and (2) the written and oral admonishments by the Trial Court, requiring a juror to follow only the law in the Court's charge, to render an informal verdict because the Court's charge requires the juror to follow only the law contained in the Court's charge and to render only a formal verdict. In the instant case, following the Trial Court's granting of the State's request for a mistrial had the Jury forewoman signed the formal verdict form in the space indicating the Jury had found the Defendant "Not Guilty" of the offense charged in the indictment and, near the spaces indicating the finding of guilt or

not guilty for the lesser-included offense written "the jury is deadlocked at 8 Not Guilt/4 Guilty" for the lesser-included offense, would the State concede this to be an informal verdict of acquittal? Is there any doubt that had this jury been instructed to do so that we would have a different result?

A jury is instructed on almost everything it needs to reach a formal verdict. Counsel submits that it is "almost everything" because it appears that in order to unleash the possibility that a jury can reach less than a formal verdict in a case, it must receive some type of instruction from the Trial Court that it can do so and how to do so. At a point where a jury, like here, reports that it is unanimous 12-0 for "Not Guilty" as charged in the Indictment but deadlocked 8 Not Guilty/4 Guilty for the lesser-included offense, should the Trial Court provide a supplemental instruction to ascertain if this jury "plainly intends" to render a verdict of acquittal as to offense charged in the Indictment? Should an "informal verdict" require the signatures of all 12 jurors? Should the Trial Court poll the jury in open court? Should the Trial Court be equipped with a special set of questions and ask each juror individually or the jury as a whole, to confirm whether or not the jury "plainly intends" to render a verdict of acquittal? Perhaps the Trial Court should provide a supplemental instruction regarding an informal verdict and ask the jury a special set of questions in open

court? As it stands today we are nowhere closer to understanding what should or will be accepted as an "informal verdict" than we were forty (40) years ago.

Why *Traylor* is unlike *Blueford* to the extent that where the United States Supreme Court determined the jury foreperson's report "lacked the finality necessary" to amount to an acquittal for double jeopardy purposes in *Blueford*, it would and ought not to find the same in *Traylor*.

1. Five hours of deliberation and four (4) notes before the *Traylor* jury reported orally and in writing it was deadlocked.

2. Despite the specific written instructions of the Trial Judge to NOT indicate whether the vote is guilty or not guilty, the *Traylor* jury reported to what extent and on what Charge is was deadlocked: 5 Guilty/ 7 Innocence on the Lesser-Included Charge.

3. Despite the specific written instruction of the Trial Judge to indicate the number of jurors voting one way or the other on the guilt/innocence questions without indicating whether the vote was guilty or not guilty as it applied to the jury being deadlocked in its deliberations, the *Traylor* jury elected to reveal the unanimous verdict of all twelve (12) jurors as it pertained to the offense as charged in the Indictment, the charge on which it was NOT deadlocked at all.

4. The Trial Court Judge ordered the *Traylor* Jury to deliberate for an additional hour and, if the Jury remained deadlocked on the lesser-included charge, the Jury would be required to re-appear the next morning at 9:00 AM.

5. The *Traylor* Jury re-appeared the next morning and continued deliberations for nearly three (3) more hours. At this time the Trial Court Judge acknowledged to the Jury Foreperson that while the Court recognized the Jury continued to believe the Defendant was not guilty of the offense as charged in the Indictment (first-degree felony burglary) it appeared the vote of 7 not guilty/5 guilty had changed to 8 not guilty/4 guilty in that nearly three (3) hourly period, to which the Jury Foreperson confirmed.

6. After five (5) hours of deliberation which included the following unsolicited report written by the Jury Foreperson—"Charged in the Indictment-12 Not Guilty"—to be later confirmed after four (4) more hours of deliberation by the words of the Jury Foreperson to continue to be 12 Not Guilty for the Offense as charged in the Indictment, but 8 Not Guilty/4 Guilty for the Lesser-Included Offense. After two days of deliberation, the unanimous verdict of the 12 for "Not Guilty" as Charged in the Indictment was submitted once in written form, confirmed once implicitly in writing, and confirmed once explicitly and once implicitly in the oral exchanges between the Trial Judge and the Jury

Forewoman. The written communications reporting the votes for and against guilt were signed by the Jury Forewoman. At the time deliberations came to an end the unanimous verdict of the 12 for "Not Guilty" for the offense as Charged in the Indictment continued to remain unanimous and unchanged, with absolutely no suggestion or even the slightest hint or suggestion that the original 12-0 vote for "Not-Guilty" had changed.

7. During the Trial Court's final discussion with the jury foreperson the entire jury, all 12 jurors, were present to hear this exchange. Had the jury foreperson reported incomplete or incorrect information or failed to report relevant information it is reasonable to believe one, several or even as many as all 11 other jurors would have spoken up. For instance, if there was not unanimity as to the 12 votes of not guilty for the charged offense; if the current split of 8/4 against guilt on the lesser-included offense was inaccurate; or, if even one juror had changed his or her mind on either the charged offense or lesser-included offense.

8. Unlike in *Blueford*, the Jury Foreperson's two written and multiple oral reports to the Trial Court Judge contained the "finality necessary" to satisfy the protection of the Double Jeopardy Clause as it pertained to the first-degree felony Burglary charge.

9. Notwithstanding *Blueford*, current Texas Law under Article 37.10 of the Texas Code of Criminal Procedure regarding the determination of an informal verdict based on whether a jury first *plainly intended* a verdict in this cause, and second *plainly intended* the verdict to be an acquittal yields the same result: the jury's informal verdict of acquittal on the first-degree burglary charge was protected for double jeopardy purposes and ought to have permitted a second trial on only the second-degree burglary charge.

CONCLUSION

1. Has the Court of Appeals misapplied *Blueford v. Arkansas* by holding that the two jury notes indicating the jury deadlocked on a lesser-included offense amount to an informal verdict of acquittal on the charged offense?

Answer: No, because it was one Jury note indicating a unanimous vote of 12 for Not Guilty as to the charged offense, two additional Jury notes indicating a deadlock on the lesser-included offense, an additional oral report from the Jury Forewoman that the Jury remained deadlocked on the lesser-included offense, and then, at the conclusion of deliberations, the oral report by the Jury Forewoman that the Jury remained unanimous against guilt for the charged offense but deadlocked as to the lesser-included offense.

2. Do mere jury notes regarding a deadlock on a lesser-charge contain sufficient indicia to show the jury manifestly intended an informal verdict of acquittal?

Answer: This is not what the record shows in *Traylor*. The written communications and the oral reports provided by the Jury Forewoman over a two-day period showed the jury manifestly intended an informal verdict of acquittal.

3. Did *Blueford v. Arkansas* overrule this Court's precedent that a jury's report of its progress towards a verdict does not amount to an informal verdict of acquittal?

Answer: No, because the written communications and oral reports provided by the Jury Forewoman in *Traylor* culminated in far more than a mere report of its progress towards a verdict but rather a jury that plainly intended to render a verdict of acquittal.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays this Honorable Court AFFIRMS the judgment of the Court of Appeals. In the alternative, Appellant requests this Court direct the Court of Appeals to instruct the Trial Court, after reviewing the record and specifically the notes of the jury

and the oral communications between the Trial Court and the Jury, to make appropriate findings on whether or not the Jury plainly intended to render a verdict of acquittal as to the charged offense or was nothing more than a Jury making progress towards a verdict.

Respectfully Submitted,

/s/ Marc Joseph Fratter
Law Office of Marc J. Fratter
Bar No. 24029973
1207 West University Drive
Suite 101
McKinney, Texas 75069
Tel. (214) 471-3434
Fax (972) 424-4719
mfratter@yahoo.com

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2018 a true copy of the foregoing *Appellant's Brief on State's Petition for Discretionary Review* has been served on the District Attorney of Collin County by electronic delivery and on the State of Texas, Prosecuting Attorney, Stacey Soule, at 209 West 14th Street, P.O. Box 13046, Capitol Station, Austin, Texas 78711, by United States certified priority mail, return receipt requested.

/s/ Marc Joseph Fratter
Marc J. Fratter

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 9.4(i)(3) and 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure the undersigned counsel certifies that the total word count of the *Appellant's Brief on State's Petition for Discretionary Review* filed in the above-referenced cause according to the Microsoft Word program is 4,059, exclusive of the sections of the Reply exempted by Rule 9.4(i)(1).

/s/Marc Joseph Fratter
Marc J. Fratter